

NTSB Order No.  
EM-50

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 31st day of March 1976.

OWEN W. SILER, Commandant, United States Coast Guard,

vs.

MANUEL NEVES, JR. Appellant.

Docket ME-51

OPINION AND ORDER

The appellant, Manuel Neves, Jr., has appealed from the decision of the Commandant affirming the suspension of his license (No.437917) for violation of a statute. Appellant's license is restricted to fishing vessels and qualifies him to serve as master for ocean voyages of such vessels. The statute involved is 46 U.S.C. 224a which requires, inter alia, that no person be "engaged or employed" as a mate aboard United States' vessels of 200 or more gross tons while "navigating on the high seas" unless that person is licensed to perform such duties by the Coast Guard.<sup>1</sup>

The Commandant's action followed appellant's appeal to him (Appeal No. 2033) from the initial decision issued by Administrative Law Judge Roscoe H. Wilkes, rendered after a full evidentiary hearing.<sup>2</sup> Throughout these proceedings, appellant has been represented by his own counsel.

The law judge found that appellant, serving as master of the CONSTITUTION, a fishing vessel of 466.92 gross tons, willfully employed or engaged an unlicensed person or persons to perform

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<sup>1</sup>The Commandant's action was taken pursuant to 46 U.S.C. 239(g). The proceeding against appellant was "based exclusively on that part of section 239, which refers to a willful violation of any of the provisions of title 52 of the Revised Statutes or any of the regulations issued thereunder ..." See 46 CFR 5.05-20(b)

<sup>2</sup>Copies of the decisions of the Commandant and the law judge are attached.

mates' duties during a voyage on the high seas from October 29 to December 4, 1973. He therefore ordered appellant's license suspended for 2 months "outright" and 6 months on 12 months' probation.<sup>3</sup> During the pendency of this appeal, the sanction has been stayed.<sup>4</sup>

In his brief on appeal, appellant contends that as a matter of law there can be no violation of 46 U.S.C. 224a because fishing vessels are exempted from the manning requirements contained in 46 U.S.C. 223,<sup>5</sup> and that this suspension action is unauthorized since a penal fine is specified for violations of 46 U.S.C. 224a. Appellant further contends that the law judge abused his discretion by granting a continuance to the Coast Guard during the presentation of its case-in-chief.<sup>6</sup> Counsel for the Commandant has submitted a reply brief in opposition.

Upon consideration of the briefs of the parties and the entire record, the Board concludes that the charge of a willful violation of 46 U.S.C. 224a is not supported by substantial evidence of a probative and reliable character; therefore, no sanction may be imposed pursuant to 46 U.S.C. 239(g).

It is undisputed that Roman Luz, a licensed officer, was employed as mate on the CONSTITUTION when the vessel commenced its voyage on October 24, 1973. On the second day at sea, he became

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<sup>3</sup>Under this order appellant would be required to serve a 2-month suspension. An additional 6-month suspension would be imposed only if a charge under 46 U.S.C. 239 OR 46 U.S.C. 239b were to be proved against him during the probationary period.

<sup>4</sup>Appellant served under a temporary license until December 12, 1975, when the Commandant refused to authorize its renewal. Thereafter, the suspension order was vacated by a District Court, and the Commandant was ordered to return appellant's license pending review by this Board.

<sup>5</sup>46 U.S.C. 223 requires at least two licensed mates aboard United States merchant vessels of between 200 and 1,000 gross tons. However, fishing vessels are expressly excluded therefrom: "Provided, That this section shall not apply to fishing ... vessels..." (emphasis in the original).

<sup>6</sup>Appellant also challenges the Commandant's findings of fact. Nothing is shown to refute the accuracy of those findings. However, we note that the Commandant, unlike the law judge, failed to make a finding with respect to the element of a willful violation of 46 U.S.C. 224a.

ill, began hallucinating, and eventually lost consciousness. Appellant decided to proceed to Cabo San Lucas, Mexico, the nearest port, to obtain medical care for Luz. Appellant also radioed his vessel's "company representative"<sup>7</sup> in San Diego to report Luz's incapacitation.

When the vessel arrived in Cabo San Lucas on October 28, a doctor came aboard to examine Mr. Luz. He diagnosed the ailment as delirium tremens and recommended hospitalization. Appellant again contacted the owner's representative to obtain a substitute mate. He was informed that a mate would be dispatched to Cabo San Lucas if available. Appellant then took Mr. Luz to La Paz, Mexico, where he was hospitalized for treatment.<sup>8</sup>

During his 31-hour stay in port, appellant continued to request a licensed mate from the company representative. However, the latter ordered him to sail without a mate on October 29. Until termination of the voyage in San Diego, on December 4, 1973, appellant was the sole licensed deck officer aboard the vessel.

46 U.S.C. 224a proscribes the employment or engagement of unlicensed individuals to serve as or perform the duties of a mate aboard vessels navigating on the high seas. We do not construe 46 U.S.C. 224a as a manning requirement, since fishing vessels are exempted from such requirements under 46 U.S.C. 223. Our sole concern with section 224a is whether or not it has been shown that unlicensed personnel performed any of the duties customarily reserved to licensed officers while the fishing vessel is navigating on the high seas. In suspension proceedings pursuant to 46 U.S.C. 239(g), willfulness is an essential element of the charge and must be established to sustain a charge of violation of statute.

In Commandant v. Goulart,<sup>9</sup> a fishing vessel master received a 3-month suspension for the violation of 46 U.S.C. 224a. In Goulart, it was established that the vessel left its home port for an extended fishing voyage without a licensed mate aboard. Appellant's vessel, on the other hand, departed San Diego with a licensed mate. Appellant, therefore, was prepared to operate on

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<sup>7</sup>The representative was the assistant to the President of C.H.B. Foods, Inc. C.H.B. Foods owned a 75 percent interest in the CONSTITUTION, and appellant owned the remaining 25 percent.

<sup>8</sup>The duration of the hospitalization is not disclosed in the record.

<sup>9</sup>1 N.T.S.B. 2340 (1972).

this voyage in full compliance with 46 U.S.C. 224a. This clearly evidenced his intention to adhere to the statutory requirements. His compliance attitude was further demonstrated by his repeated, good faith efforts to secure a replacement after the mate's incapacitation. This difficulty was compounded thereafter by what the law judge characterized as "a restless crew and the possibility of losing them should the delay continue on too long." Appellant was thus also confronted with the prospect of abandoning the fishing voyage and being stranded without a crew. Moreover, there was no showing of record that a licensed replacement was available either in Cabo San Lucas, San Diego, or elsewhere.<sup>10</sup>

In examining appellant's dilemma, we are also mindful of the fact that fishing vessels, unlike other merchant vessels governed by 46 U.S.C. 224a, do not travel from port-to-port. Instead, fishing vessels spend long periods of time at sea and generally have only a base of operations at their home port. Securing a licensed officer at ports other than the home port may not be reasonably feasible. Although we do not condone deviations from 46 U.S.C. 224a, the absence of any reasonable alternative may be a critical factor in determining whether a violation was willful. Upon analysis of the facts and circumstances in this case, we are persuaded that appellant had no reasonable alternative in proceeding to sea at Cabo San Lucas without a mate and that this action was not a willful violation of statute.

In sum, we find that the appellant had no intention to violate 46 U.S.C. 224a and demonstrated plainly that he was not indifferent to its requirements. Moreover, the extenuating circumstances which prompted his decision to sail without a licensed mate are sufficient in our view to negate willfulness as an element of the statutory violation in this instance. We therefore do not find the sanction sustainable under 46 U.S.C. 239(g). This determination makes it unnecessary for us to reach any other contentions raised by appellant's brief.<sup>11</sup>

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<sup>10</sup> 46 CFR 5.20-77 provides that the Coast Guard has the burden of proof in proceedings held pursuant to 46 U.S.C. 239(g).

<sup>11</sup> Appellant has submitted as a "supplement" to his brief the decision of a United States District Court dated January 29, 1976, in a similar but unrelated case filed against him by the Coast Guard. It was there held, inter alia, that the performance of mates' duties aboard fishing vessels by unlicensed persons is not actionable under 46 U.S.C. 224a. It is unnecessary that we distinguish this holding in view of the absence of willfulness found herein

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is granted; and
2. The order of the Commandant affirming the law judge's order suspending appellant's master's license be and it hereby is reversed.

TODD, Chairman, McADAMS, BURGESS, AND HALEY, Members of the board, concurred in the above opinion and order. THAYER, Member, dissented.

Member Thayer dissenting:

I do not agree with the majority that "the charge of willful violation of 46 USC 224a is not supported by substantial evidence of a probative and reliable character ..." In my view, there is an abundance of evidence to support a finding of a willful violation.

In summarizing their position, the majority states, "In sum, we find that the appellant had no intention to violate 46 USC 224a . . ." The record is clear that the vessel departed its home port with the requisite mate on board, and I agree that there is no evidence that the appellant set out on the voyage with a purposeful intent to violate the statute. However, the record makes it equally clear that appellant knew he should have a mate by the very fact that he had one on board when the vessel departed San Diego and by his own testimony in which he stated that he attempted to obtain a replacement mate while the vessel was in the port of Cabo San Lucas, Baja California, Mexico.

Moreover, there is no doubt from the evidence of record that when the appellant departed Cabo San Lucas and continued the voyage for 5 weeks, he did so knowing that a qualified mate was not on board, and that during those 5 weeks he knowingly and repeatedly assigned mate's duties to at least one person not licensed to perform such duties. In my view, the fact that he continued the voyage for 5 weeks without any further effort to secure a mate is strong evidence of his intention to violate the statute.

The majority also is persuaded in their finding on the basis that the appellant had no reasonable alternative. The evidence in regard to the appellant's efforts to obtain a replacement mate consists of his un corroborated testimony. Although there is no evidence in the record to refute his testimony or with respect to the availability of licensed mates, I nevertheless find it inconceivable that one could not have been located in San Diego (the 10th largest city in the country and a major seaport) and promptly delivered by air transportation to Cabo San Lucas if a

conscientious effort had been made to do so. Furthermore, with respect to alternatives, an extended sea voyage which took the vessel more than a thousand miles farther away from its home port and across major traffic lanes for shipping bound to and from the Panama Canal as well as coastwise, is overwhelming evidence that the appellant willfully took the alternative which completely and continually ignored the proscriptions of the statute. To make a voyage under those circumstances with only one qualified deck officer is extremely hazardous, if not completely reckless. If, in fact, a mate could not be found, appellant, as a last resort, could have presented his dilemma to the Coast Guard and requested assistance. Instead, he chose to proceed with the one alternative that exposed, for an extended time, not only his vessel crew, but also other shipping to the risk of collision and to the many other hazards well known to exist in a vessel at sea without a qualified mate on watch. Since appellant was 25% owner of the vessel, I am surprised that he would take the risk of liability involved if the vessel were to be in collision or other accident in these circumstances. Also, it is not difficult for me to predict that the resolution of this dilemma would have been quite different if the appellant had been hospitalized instead of the mate.

I cannot join my colleagues in the belief that the extenuating circumstances left the appellant no alternative but to continue the fishing voyage. There is no doubt that the appellant was faced with strong economic pressures, especially since he was a 25% owner of the vessel. There is equally no doubt, as indicated by the alternative he chose, that he was influenced by economic factors in a priority above all other considerations. Whereas I am not unmindful of the economic factors, and sympathize with the appellant in the misfortune which befell him, I believe that he had other options and that he could have resolved this matter satisfactorily with a minimum of economic loss and without being charged with violating the statute.

Appellant has been represented throughout this proceeding by what the Administrative Law Judge characterized as "competent professional counsel," and the record eloquently supports that statement. Therefore, it is significant that, in the appeal to this Board, the issue of willfulness was not raised by the appellant. The inference I must draw is that appellant's counsel believes with me that the appellant's actions were willful albeit the appeal contends that by statutory construction there was no violation. In my view, it would have been preferable to have addressed the question of statutory construction, which was the main issue raised, although I would have also denied the appeal on that basis.

Finally, one other matter deserves comment. The record in

this case is adequate but far from a model of clarity and completeness. The record is lacking in some pertinent matters which would have been helpful in deciding this case. Therefore, the Coast Guard should be mindful that a thorough and complete record is quite important throughout the various levels of administrative and judicial